

NEW APPLICATION  
**ORIGINAL**



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RECEIVED

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AZ CORP COMMISSION  
DOCKET CONTROL

Arizona Corporation Commission

**DOCKETED**

APR -9 2010

Attorneys for Drake Cement, LLC

DOCKETED BY

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**BEFORE THE ARIZONA CORPORATION COMMISSION**

IN THE MATTER OF THE APPLICATION  
OF DRAKE CEMENT, LLC TO  
ESTABLISH A NEW RAILROAD  
CROSSING ON YAVAPAI COUNTY  
ROAD 71 NEAR THE CITY OF DRAKE,  
YAVAPAI COUNTY, ARIZONA, DOT  
CROSSING NO. AAR/DOT# 933-885T

DOCKET NO. RR-20736A-10-0140

**APPLICATION FOR  
ESTABLISHMENT OF NEW PUBLIC  
HIGHWAY-RAIL GRADE  
CROSSING**

**INTRODUCTION**

Drake Cement, LLC ("Drake") hereby submits the above-captioned application to the Arizona Corporation Commission ("Commission"), seeking approval to establish a new public at-grade crossing ("New Crossing") on Yavapai County Road 71 ("CR71") that will result with the construction of an industrial rail spur to serve Drake's cement plant operations near Drake, Arizona. This crossing project is part of an overall plan Drake and Yavapai County ("Yavapai") have to re-align CR71 in order to address traffic issues created by the location of Drake's new cement plant. Approval of this application would authorize the establishment of a new public at-grade crossing where CR 71 intersects with Drake's industrial rail spur. A copy of the agreement between the County and Drake is attached hereto as **Exhibit 1**.<sup>1</sup> Representatives from Drake, Yavapai and the

<sup>1</sup> The agreement will be addressed and voted on by the Yavapai County Board of Supervisors on April 19, 2010.

1 Commission's Office of Railroad Safety conducted an on-site meeting on March 8, 2010.

2 **I. Project Location and Description.**

3 The New Crossing will be located near Drake, Arizona, near State Highway Route  
4 89 (Hwy 89) and CR71. Currently, CR71 is fully paved between Hwy 89 and a BNSF  
5 Railway Company ("BNSF") public at-grade crossing, which includes approximately 1.8  
6 miles of 24-ft wide asphalt pavement. The first 1.25 miles are approximately 30 years  
7 old, and the next 0.55 miles includes new pavement placed by Drake in the Spring of 2008  
8 prior to the start of the Drake cement plant construction. The New Crossing would be  
9 located approximately 0.4 miles after the BNSF crossing where CR 71 intersects Drake's  
10 future industrial spur. Approval of the New Crossing will allow Drake to finish  
11 construction of its industrial spur so that operations can begin at Drake's cement plant. A  
12 diagram of the New Crossing is attached hereto as **Exhibit 2**.

13 **II. Need for the New Crossing.**

14 The New Crossing is needed to enhance public vehicular safety near the Drake  
15 cement plant. Drake has entered into an agreement with BNSF to bring coal to the Drake  
16 site. Coal is needed to fire up the plant's kiln that will convert the necessary raw materials  
17 (e.g. limestone, bauxite, iron ore, etc.) into clinker, which will eventually lead to the  
18 production of cement. Drake has projected the production of approximately 660,000 short  
19 tons of cement annually, and to complete this, it will be necessary to transport  
20 approximately 800 cars of coal per annum, or 15 rail cars per week. Drake has the  
21 capacity of holding 12 railcars at a time within its plant site, meaning that only 2 crossings  
22 will be necessary per week to handle the inbound of raw materials and the outbound of  
23 cement sold.

24 **III. Grade Separation is Not a Viable Alternative.**

25 There were two main considerations taken into account when determining whether  
26 there was a need for grade separation at the New Crossing:

- a) Traffic associated with the crossing, both railroad crossing and vehicular traffic along the road; and
- b) Geometry associated with the crossing, including appropriate sight distances and warning and regulatory signs.

Regarding the first consideration, only two crossings will be made weekly to serve Drake's cement operations. Also, regarding the geometry associated with the New Crossing, both the horizontal and vertical alignment need to be considered to account for appropriate sight distances. The New Crossing itself will be quite flat, with maximum slopes of 2% towards the crossing. The horizontal sight distance depends greatly on the crossing angle, which is 70 degrees. Even though this is not the 90 degrees that would be fully desired, there are additional factors that need to be considered:

- Along the crossing, no protuberances or structures will interfere with the sight distances.
- A barbwire fence will be provided between CR71 and Drake's spur line with directional warning signs to prevent any confusion between the road and the railroad line. Similarly, south of CR71, barbwire fence already exists that separate CR71 from the Drake property.

Due to physical limitations, it is impossible to construct a grade-separated public highway-rail crossing without severe impact to Drake's cement operations and surrounding businesses.

#### **IV. Warning Devices to be Installed.**

Due to the reduced number of times that the New Crossing is to be used by Drake, the following warning and regulatory signs have been recommended by Yavapai and Commission Staff to enhance public safety:

- a) Railroad Crossing Warning Signs, installed along both directions of CR71 per MUTCD standards;

- 1 b) Railroad Skewed Warning Signs, indicating the skewed angle, installed along both  
2 directions of CR71 per MUTCD standards;  
3 c) Railroad Crossing signs per MUTCD standards, indicating the USDOT crossing  
4 number;  
5 d) Install two rolling gates with stop signs facing both directions of traffic. This is to  
6 be manually placed by Drake railroad operators when the crossing is to be made,  
7 and removed immediately after the crossing has been completed.

8 A visual diagram of the warning devices to be used at the New Crossing is attached hereto  
9 as **Exhibit 3**.

10 **V. Average Daily Traffic Counts, Daily Train Movement, Traffic Reports.**

11 Information and data concerning traffic counts is attached hereto as **Exhibit 4**.

12 **VI. Crossing Maintenance.**

13 By agreement, Drake will maintain the New Crossing surfaces and any signals and  
14 warning devices, while Yavapai will maintain the road approaches, any sidewalks,  
15 roadway signs and pavement striping in accordance with MUTCD guidelines.

16 **VII. Project Costs.**

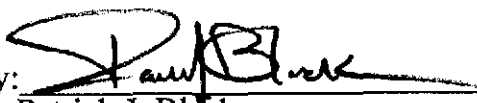
17 All costs associated with the approval and construction of the New Crossing shall  
18 be borne by Drake. The estimated cost of construction is \$228,850, as more fully set forth  
19 in **Exhibit 5**, attached hereto and incorporated by reference.

20 **RELIEF REQUESTED**

21 Drake respectfully requests that the Commission approve this application to  
22 establish a new public at-grade crossing on an expedited basis so that Drake can begin  
23 cement operations. The new Drake cement plant is expected to bring jobs and economic  
24 development within Yavapai County, and Drake has worked closely with both county  
25 engineers and Commission Staff to ensure that the establishment of the New Crossing will  
26 not jeopardize the public convenience and safety.

1 RESPECTFULLY SUBMITTED this 9<sup>th</sup> day of April, 2010.

2 FENNEMORE CRAIG, P.C.

3  
4 By:   
5 Patrick J. Black  
6 Attorneys for Drake Cement, LLC

7 **ORIGINAL** and 13 copies filed  
8 this 9<sup>th</sup> day of April, 2010 with:

9 Docket Control  
10 Arizona Corporation Commission  
1200 West Washington Street  
Phoenix, Arizona 85007

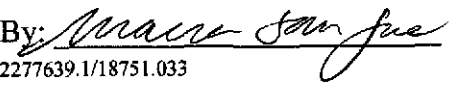
11 **COPY** hand-delivered  
12 this 9<sup>th</sup> day of April, 2010 to:

13 Charles Hains  
14 Legal Division  
15 Arizona Corporation Commission  
1200 West Washington Street  
Phoenix, Arizona 85007

16 Brian Lehman, Chief  
17 Railroad Safety Section  
18 Arizona Corporation Commission  
1200 West Washington Street  
Phoenix, Arizona 85007

19 **Copy** sent via mail  
20 this 9<sup>th</sup> day of April, 2010 to:

21 Martin Brennan  
22 Yavapai County Attorney's Office  
2830 N. Commonwealth, Suite 106  
Camp Verde, Arizona 86322

23  
24 By:   
2277639.1/18751.033

**Application For Establishment  
Of New Public Highway-Rail Grade Crossing**

**EXHIBIT 1**

**YAVAPAI COUNTY**

**PUBLIC WORKS ENGINEERING DEPARTMENT**

**COUNTY IMPROVEMENT PROJECT AGREEMENT**

**for the**

**RE-ALIGNMENT OF A PORTION OF YAVAPAI COUNTY ROAD 71**

**and the**

**ESTABLISHMENT OF TWO PUBLIC HIGHWAY-RAIL GRADE CROSSINGS AND RAIL  
OPERATIONS**

**BY AND BETWEEN**

**YAVAPAI COUNTY**

**AND**

**DRAKE CEMENT, LLC**

THIS AGREEMENT is made this \_\_\_\_\_ day of \_\_\_\_\_, 2010, between DRAKE CEMENT, LLC, a Delaware limited liability company ("DRAKE"), and YAVAPAI COUNTY, a political subdivision of the State of Arizona, hereinafter referred to as (the "COUNTY")(each a "Party" and collectively, the "Parties").

**RECITALS:**

- A. DRAKE owns a railroad switchyard and associated railroad tracks ("Drake Yard"), and an industrial spur that, upon completion, will initially solely service a cement plant on certain other Drake owned property (the "Drake Spur" and collectively with the Drake Yard, the "Property"), in the County of Yavapai, Arizona as shown on Exhibit 1.
- B. DRAKE has entered into an Operating Agreement dated January 22, 2010 with DRAKE SWITCHING COMPANY, LLC, an Arizona limited liability company ("Authorized Representative"), attached hereto as Exhibit 2, to operate the tracks and rail car activity on the Drake Property.
- C. DRAKE proposes to relocate an existing at-grade public rail grade crossing (AAR/DOT # 025751N) located at milepost 3 of Yavapai County Road 71 ("CR71") within the Drake Yard at railroad milepost 0000.72 ("**Existing Crossing**"). The relocated crossing will be located near railroad milepost 0000.75 and be assigned the same AAR/DOT# 025751N ("**Relocated Crossing**"). Construction and use of the **Relocated Crossing** will also cause the removal and permanent closure of the **Existing Crossing**. Diagrams of both the **Existing Crossing** and the **Relocated Crossing** are depicted on Exhibit 3.
- D. DRAKE also proposes to establish a new at-grade public crossing located on the Drake Spur at milepost 2 of CR71 ("**New Crossing**"). The **New Crossing** will be located near railroad milepost 0000.50 and will be assigned AAR/DOT# 932867S. A diagram of the proposed **New Crossing** is depicted on Exhibit 4.
- E. The Parties acknowledge that construction of the **Relocated Crossing** and the **New Crossing** and the closure of the **Existing Crossing** are subject to approval by the Arizona Corporation Commission ("Commission").
- F. In order to facilitate the construction, operation and maintenance of the **Relocated Crossing** and **New Crossing**, as well as the closure of the **Existing Crossing**, the Parties agree that a realignment of a portion of CR71 (the "**Road Segment**") is required in order to maximize public safety at each of the crossings. The proposed realigned **Road Segment** is shown on Exhibit 5.
- G. The Parties hereto desire to express in writing their understanding and agreement with respect to responsibilities for the construction, operation and maintenance of the **Relocated Crossing** and **New Crossing**, and the permanent closure of the **Existing Crossing** as well as the construction and subsequent dedication of the **Road Segment** (collectively, the "PROJECT").



- H. All numbered exhibits are incorporated and made a part of this AGREEMENT by reference and attachment regardless of designation or alphabetical order.

### **AGREEMENT**

NOW, THEREFORE, IT IS MUTUALLY AGREED BY AND BETWEEN THE PARTIES HERETO AS FOLLOWS:

### **ARTICLE I - DEFINITIONS**

- A. AGREEMENT means this specific AGREEMENT with all attached exhibits together with all attachments incorporated by reference.
- B. CROSSINGS, when used in plural form, shall mean the following:
- Existing Crossing** means the existing at-grade public road crossing in the Drake Yard for CR71 located at railroad milepost 0000.72 (AAR/DOT # 025751N). Exhibit 2.
- Relocated Crossing** means a new at-grade public road crossing in the Drake Yard for CR71 located at railroad milepost 0000.75 (AAR/DOT # 025751N). Exhibit 3.
- New Crossing** means a new at-grade public road crossing on the Drake Spur for CR71 at railroad milepost 0000.50 (AAR/DOT # 932867S). Exhibit 4.
- C. PLANS means (i) the final one hundred percent (100%) completed PROJECT plans and specifications affecting and pertaining to the Drake Property. All project plans shall be sealed by an engineer who is registered in the State of Arizona.
- D. PROJECT means all work of every kind and character required in connection with all construction and/or closure (as appropriate) of the **realigned Road Segment and the CROSSINGS**. The PROJECT includes, but is not limited to, the construction of any and all roadway improvements, installation of railroad safety devices and appurtenances, communication lines, signal and electrical lines and appurtenances, grading, both temporary and permanent drainage facilities, irrigation facilities, signing and striping, modification to utilities, right of way acquisition, preliminary and construction engineering, contract preparation, cuts, fills, highway pavement, retaining walls and all highway facilities at the locations shown on PROJECT PLANS and specifications included herein by reference only.
- E. PROJECT COSTS means the actual fees and costs for the entire PROJECT, which shall be the responsibility of DRAKE.
- F. STAFF means the staff of the Commission's Railroad Safety Division.

- F. WORK means any work to be performed by DRAKE or its contractors or agents, in accordance with the PLANS. WORK shall include engineering, design, management, administration, design, and construction labor, including approved changes in scope.

## **ARTICLE II - DRAKE OBLIGATIONS**

- A. DRAKE shall, in cooperation with both the COUNTY and STAFF, design all phases of the PROJECT in compliance with all applicable federal, state and local rules and regulations governing the subject matter of this AGREEMENT.
- B. DRAKE shall promptly provide COUNTY and STAFF the opportunity to review and comment on progress copies of the design plans at the 95% completion stages, along with a copy of the final PLAN submittal. Submittal to the COUNTY shall be for purposes of consistency with adopted road design and construction specifications and to STAFF for review of safety issues related to the CROSSINGS. Upon receipt of the final plan submittal, COUNTY shall signify by letter addressed to DRAKE its full approval of the design PLANS.
- C. DRAKE shall complete the WORK, at its own expense, which shall include:
1. the design and construction of the **Relocated Crossing**;
  2. the design and construction of the **New Crossing**;
  3. the removal and closure of the **Existing Crossing**;
  4. obtaining United States Forest Service approval for the location of Transportation and Utility Systems and Facilities on Federal Land (Standard Form 299); and
  5. the design and construction of the realigned Road Segment.
- D. Upon completion of the WORK and acceptance by the COUNTY (as appropriate), DRAKE, at its expense, shall deliver to COUNTY any required right of way dedication for the **Road Segment**, as well as an assignment of authorization from the United States Forest Service for that portion of the **Road Segment** on federal land for the right to construct, use, maintain, repair, renew and reconstruct the **Road Segment**, the **Relocated Crossing** and **New Crossing**. The right of way dedication map is attached hereto as Exhibit 6. Upon completion of the dedication and assignment of authorization for the federal lands, DRAKE shall have no further responsibility for maintenance or repair of the **Road Segment**, as more specifically set forth in Article V, Section H.
- E. DRAKE shall secure all required permits, easements and right-of-ways necessary to complete the PROJECT in accordance with the PLANS.
- F. DRAKE shall file an application with the Commission for an order authorizing construction of the **New Crossing** in accordance with this AGREEMENT. Due to the need for DRAKE to commence cement plant operations by March 2010, it is anticipated

that DRAKE's New Crossing application shall be filed separately and prior to COUNTY's application requirements set forth in Article III.C.

### **ARTICLE III-COUNTY OBLIGATIONS**

- A. COUNTY shall timely provide DRAKE comments on the design plans at the 95% completion stage along with a copy of the final Plan submittal. A copy of the final PLANS shall be adopted and incorporated into this AGREEMENT by reference, and attached hereto as Exhibit 7.
- B. COUNTY shall provide any inspections necessary before final approval and acceptance of the reconstructed **Road Segment**.
- C. COUNTY shall file an application with the Commission for an order authorizing construction of the **Relocated Crossing**, and closure of the **Existing Crossing**, in a form similar to DRAKE's application for the **New Crossing**.
- D. COUNTY will provide DRAKE, upon request, access to information in its possession related to the location of any underground utility facilities in the right of way that are affected by the PROJECT. DRAKE agrees to coordinate with the COUNTY and any applicable public or private utility company and to be solely responsible for identifying and locating utility facilities. DRAKE shall further be responsible for the cost of relocating any wire lines, pipe lines and other utility facilities during the course of constructing the PROJECT..
- E. DRAKE shall, when appropriate, submit a traffic control plan to the COUNTY for approval. Upon approval by COUNTY, DRAKE shall be responsible for implementing the traffic control plan, including paying all costs thereof.

### **ARTICLE IV-THE WORK**

- A. All WORK contemplated in this AGREEMENT shall be performed in a good and workmanlike manner in accordance with the PLANS. Each portion shall be promptly commenced by the Parties hereto obligated to do the same and thereafter diligently prosecuted to conclusion in its logical order and sequence. Furthermore, any changes, or modifications during construction that affect the WORK obligated by DRAKE shall be agreed to by both Parties, and in conjunction with STAFF with respect to the CROSSINGS.
- B. The WORK as defined in the PLANS concerning the CROSSINGS, is subject to the Commission's approval, with minimum clearances of not less than those specified by the Commission, or as otherwise authorized by the Commission for DRAKE's tracks at this location.
- C. If COUNTY shall deem it necessary or desirable, in the future, due to traffic conditions or maintenance concerns, to alter or reconstruct the **Road Segment** or **CROSSINGS** herein contemplated, it may do so, the cost of which shall be paid by COUNTY. If further encroachment upon DRAKE'S property will result, then COUNTY, prior to

commencing any such alteration or reconstruction work, shall submit revised plans for review to DRAKE. In addition, prior to acquiring the desired property or altering or reconstructing the Road Segment or CROSSINGS, COUNTY shall consult with Drake and consider the execution of an addendum to this AGREEMENT or the completion of a separate agreement, related to the proposed alteration or reconstruction.. For any improvement to the CROSSINGS, COUNTY shall file an application with the Commission for approval prior to construction and upgrades.

- D. In the event conditions or circumstances require a change in the scope of WORK on the PROJECT as set forth in this AGREEMENT and in the PLANS, each party shall agree in writing to the changes, including payment responsibilities, prior to performing the work.

#### ARTICLE V - MISCELLANEOUS

- A. The Parties shall use arbitration after exhausting applicable administrative remedies to resolve disputes arising out of this AGREEMENT where the sole relief sought is monetary damages of \$100,000.00, or less, exclusive of interest and costs, as provided in A.R.S. § 12-1518.B. All the covenants and provisions of this AGREEMENT shall be binding upon and inure to the benefit of the successors and assigns of the Parties hereto, except that no Party may assign any of its rights or obligations hereunder without the prior written consent of the other Party.
- C. The effective date of this AGREEMENT shall be the day on which the last Party executes the AGREEMENT.
- D. This AGREEMENT, including any schedules, exhibits or attachments hereto, constitutes the entire agreement between the Parties, and no understanding or obligation not expressly set forth herein shall be binding upon them. No modification, amendment or alteration of this AGREEMENT shall be valid unless it is in writing and signed by both parties.
- E. This AGREEMENT shall be governed by the laws of the State of Arizona, unless such laws are otherwise preempted by Federal statutes, rules and/or regulations.
- E. The waiver by either party of any breach or failure to provide full performance under any of the terms or conditions of this AGREEMENT shall not be construed as a waiver of any other term or condition, or of any subsequent breach of the same or any other term or condition.
- F. Any notice provided for or concerning this AGREEMENT shall be in writing and be deemed sufficiently given when sent by certified mail, return receipt requested, to the parties at the following addresses:

DRAKE

Manager – Public Projects  
Drake Cement, LLC  
1301 E  
Prescott, AZ 85034

COUNTY

County of Yavapai, Arizona  
Public Works Department  
Attn: County Engineer  
1100 Commerce Drive  
Prescott, Arizona 85007

- G. Once the **Relocated Crossing** and **New Crossing** have been constructed and placed into operation, DRAKE shall be responsible for maintaining CROSSING surfaces and active warning devices, while COUNTY shall be responsible for maintenance of road approaches, any sidewalks, roadway signs and pavement striping in accordance with the MUTCD.
- H. Each Party represents that it is a sophisticated Party capable of understanding all of the terms of this AGREEMENT, that it has had an opportunity to review this AGREEMENT with its counsel, and that it executes this AGREEMENT with full knowledge of the terms of the AGREEMENT. This AGREEMENT is not to be construed against the drafter.
- I. Indemnification And Liability. The Parties shall defend, indemnify, save and hold each other harmless their officials, directors, officers, employees, attorneys, agents, and representatives from and against any and all claims, actions, enforcement proceedings, liabilities, damages, losses, and/or expenses of any kind (including, but not limited to, costs of claim processing, investigation, litigation, attorneys fees, court costs, and costs of appellate proceedings) (hereinafter referred to as "Claims") relating to, arising out of, or alleged to have resulted from, in whole or in part, any error, mistake, omission, work, or services of a party, their directors, officers, employees, attorneys, agents, representatives, or any tier of subcontractors in the performance of this Agreement. Each Party's indemnification obligations hereunder includes Claims arising out of, or recovered under, Arizona's Workers' Compensation Law or the failure to conform to any Federal, State, or local law, statute, ordinance, rule, regulation or court decree. It is the specific intention of the Parties that the indemnification provided hereunder shall apply to all Claims, except for Claims arising from the negligent or willful acts or omissions of a Party. Each Party shall have the right, at its sole discretion, to approve any defense pursuant to the indemnification obligations hereunder or to assume responsibility for its own defense and have the other Party pay all reasonable costs and expenses (including attorney fees) incurred in such defense.
- J. DRAKE shall comply with all applicable rules and regulations, including but not limited to A.A.C. R14-5-104.C.7, concerning time limits placed on blockage at the CROSSINGS resulting from railroad operations within the Drake Property.

DRAKE CEMENT, LLC

COUNTY OF YAVAPAI, ARIZONA

By: \_\_\_\_\_  
Title: \_\_\_\_\_  
Its: \_\_\_\_\_  
Date: \_\_\_\_\_

By: \_\_\_\_\_  
Title: \_\_\_\_\_  
Its: \_\_\_\_\_  
Date: \_\_\_\_\_

ATTEST:

\_\_\_\_\_  
Clerk, Board of Supervisors

## **LIST OF EXHIBITS**

1. EXHIBIT 1 Map and Legal Description of Drake Property
2. EXHIBIT 2 Operating Agreement between Drake Cement, LLC and Drake Switching Company, LLC.
3. EXHIBIT 3 Diagram of Existing Crossing and Relocated Crossing
4. EXHIBIT 4 Diagram of Proposed New Crossing
5. EXHIBIT 5 Diagram of Road Segment
6. EXHIBIT 6 Dedicated Right of Way from U.S. Forest Service
7. EXHIBIT 7 Final Plans for Crossings and Road Segment

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## **EXHIBIT 1**

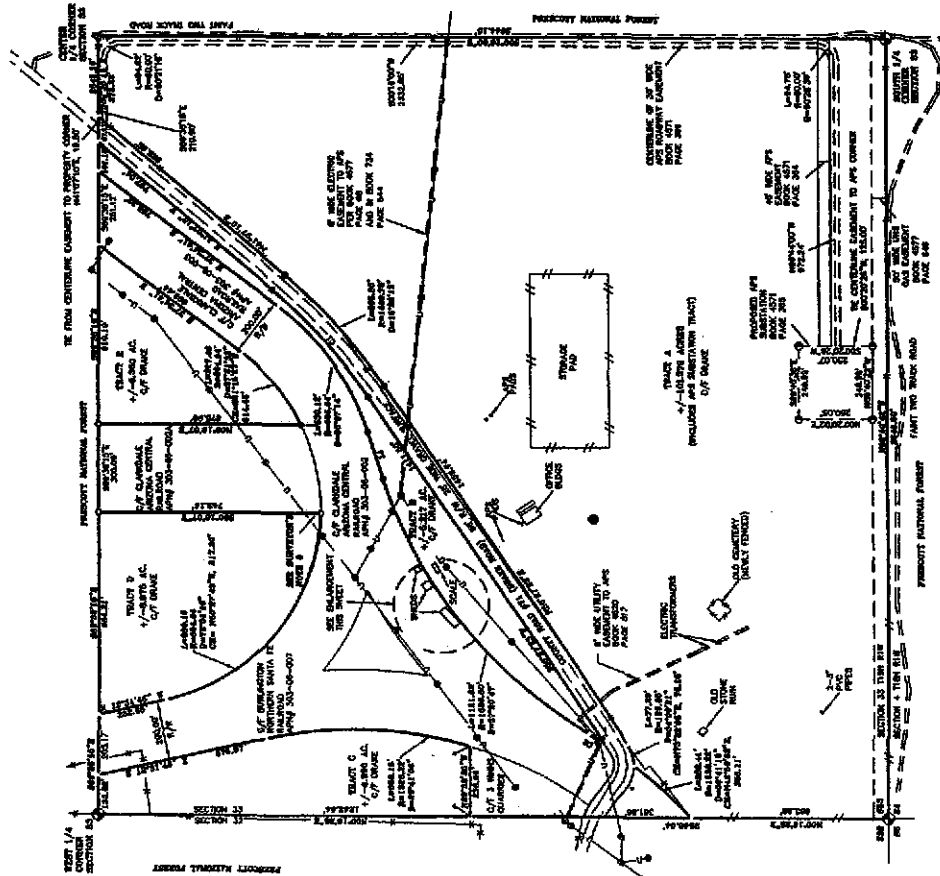
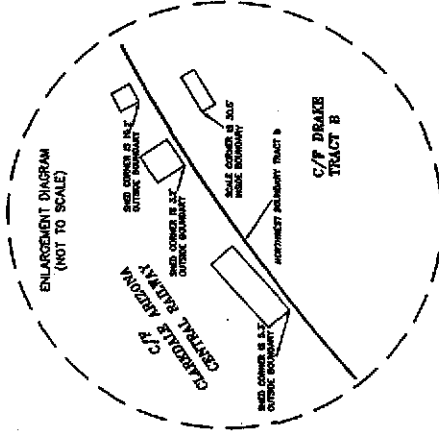


**Exhibit 1**  
**(Legal Description of Property)**

Approximately 34.4 acres of railroad property and assets within Sections 28 and 33, T19N, R01W, Yavapai County Arizona (The first 6864 feet (1.3 mile) by 200 feet in width, starting at the BNSF switch east to the east end of the # 2 turn. This includes both the north curve (#1) connection and the south curve connection plus the 4.92 acres in the NE ¼, NW ¼, SW ¼ of section 33.

As recorded per Book 178, Pages 68 and 69 of Land Surveys of Yavapai County Recorder's Office (May 2008).

A PORTION OF THE SOUTHWEST QUARTER OF SECTION 33  
TOWNSHIP 19 NORTH, RANGE 1 WEST, GILA AND SALT  
RIVER BASE AND MERIDIAN, YAVAPAI COUNTY, ARIZONA

[illegible]

### BASIS OF BEARINGS

No. 4235097  
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[illegible]

CONFIDENTIAL

ALTA/ACSM LAND TITLE SURVEY  
DRAKE CEMENT LLC  
YAVAPAI COUNTY  
ARIZONA

## RESULTS

1 OF 2

**JOB NUMBER 2006718**

L.S. 178/69

A PORTION OF THE SOUTHWEST QUARTER OF SECTION 33,  
TOWNSHIP 19 NORTH, RANGE 1 WEST, GILA AND SALT  
RIVER BASE AND MERIDIAN, YAVAPAI COUNTY, ARIZONA

[illegible]

DISCOUNTED INVENTORIES are extremely desirable trade items. The Southwest Office of Supply, 135 Broadway, New York 19, has a large stock of such items. Also, the Southwest Office of Supply, 135 Broadway, New York 19, has a large stock of such items. Also, the Southwest Office of Supply, 135 Broadway, New York 19, has a large stock of such items.

[illegible]

ALTA/ACSM LAND TITLE SURVEY  
DRAKE CEMENT LLC

## **EXHIBIT 2**

**OPERATING AGREEMENT**  
**OF**  
**DRAKE SWITCHING COMPANY, LLC**

This OPERATING AGREEMENT (this "Agreement") is made as of this 17 day of February 2010, by Skanon Investments, Inc. (the "Member").

**ARTICLE 1**

**FORMATION, NAME, PURPOSES**

**1.1 FORMATION.** The Member hereby forms a limited liability company (the "Company") pursuant to the Arizona Limited Liability Company Act (the "Act"), effective upon the filing of the Articles of Organization for the Company with the Arizona Corporation Commission. The Member will from time to time execute or cause to be executed all such certificates, fictitious name or business statements and other documents, and make or cause to be made all such filings, recordings and publishings, and do such other acts as the Member may deem necessary or appropriate to comply with the requirements of law for the formation and operation of the Company in all jurisdictions in which the Company desires to conduct business. The Member will cause the Company to be qualified or authorized to do business in any jurisdiction in which such qualification or authorization is necessary in connection with the conduct of the Company's business.

**1.2 NAME.** The name of the Company will be "Drake Switching Company, LLC."

**1.3 REGISTERED OFFICE.** The Company's registered office in the State of Arizona will be located at 14500 North Northsight Boulevard, Suite 317, Scottsdale, Arizona 85260 for the purpose of maintaining the records required to be maintained under the Act, or at such other location as the Member will determine in its sole discretion.

**1.4 PURPOSE AND POWERS.** The business and purpose of the Company is to acquire, own, finance, lease, manage, operate, maintain, sell, or otherwise dispose of a business engaged in the operation of a railroad switching yard. The Company may exercise all powers reasonable or necessary to pursue the same. The Company will have all of the powers permitted by law.

**1.5 TERM.** The term of the Company will be perpetual, unless sooner terminated under the provisions of Article 7 or in accordance with the Act.

**1.6 AGENT FOR SERVICE OF PROCESS.** The name and business address of the Company's initial agent for service of process are Marco Gomez-Barrios, 14500

North Northsight Boulevard, Suite 317, Scottsdale, Arizona 85260. The Member may remove and replace the Company's agent for service of process at any time.

## ARTICLE 2

### CAPITAL CONTRIBUTIONS

**2.1 INITIAL CAPITAL CONTRIBUTION.** Contemporaneously with the execution of this Agreement, the Member will make such contributions of cash and property to the capital of the Company as are necessary to accomplish the Company's purposes.

**2.2 ADDITIONAL CAPITAL CONTRIBUTIONS.** The Member may make such additional contributions to the capital of the Company as the Member determines are necessary in its sole and absolute discretion to pay when due the obligations and expenses of the Company or to otherwise accomplish the Company's purpose. This provision shall not operate for the benefit of or be enforceable by any creditors of the Company or any other third parties.

## ARTICLE 3

### MANAGEMENT

**3.1 MANAGEMENT BY MEMBER.** The business and affairs of the Company will be managed exclusively by the Member. The Member will direct, manage, and control the business of the Company and will have full and complete authority, power, and discretion to make any and all decisions and to do any and all things that the Member will deem to be reasonably required to accomplish the purpose and business of the Company.

**3.2 MANAGEMENT POWERS AND RESPONSIBILITIES.** Without limiting the generality of Section 3.1, the Member will have the power and authority on behalf of the Company:

(a) To sell property to or acquire property from any person as the Member may determine. The fact that the Member is directly or indirectly affiliated or connected with any such person will not prohibit the Member from dealing with that person;

(b) To open from time to time bank accounts in the name of the Company and to designate and remove from time to time, at its discretion, all signatories on such bank accounts;

(c) To borrow money from banks, other lending institutions, individuals, the Member, or affiliates of the Member on such terms as it deems appropriate, and in connection therewith, to hypothecate, encumber, and grant security interests in the assets of the Company to secure repayment of the borrowed sums;

(d) To purchase liability and other insurance to protect the Company's property and business;

(e) To hold and own any Company real and/or personal properties in the name of the Company;

(f) To invest any Company funds (by way of example, but not limitation) in time deposits, short-term governmental obligations, commercial paper, or other investments;

(g) To sell or otherwise dispose of all or substantially all of the assets of the Company as part of a single transaction or plan so long as such disposition does not violate or otherwise cause a default under any other agreement to which the Company may be bound;

(h) To execute on behalf of the Company all instruments and documents, including, without limitation, checks, drafts, notes, and other negotiable instruments, mortgages or deeds of trust, security agreements, financing statements, documents providing for the acquisition, mortgage or disposition of the Company's property, assignments, bills of sale, leases, partnership agreements, and any other instruments or documents necessary, in the opinion of the Member, to the business of the Company;

(i) To employ accountants, legal counsel, managing agents, or other experts to perform services for the Company and to compensate them from Company funds;

(j) To make an assignment for the benefit of creditors of the Company, file a voluntary petition in bankruptcy, or appoint a receiver for the Company;

(k) To enter into any and all other agreements on behalf of the Company with any other person or entity for any purpose, in such forms as the Member may approve; and

(l) To do and perform all other lawful acts as may be necessary or appropriate to the conduct of the Company's business.

**3.3 AUTHORITY TO BIND THE COMPANY.** Unless authorized in writing to do so by this Agreement or by the Member, no agent or employee of the Company will have any power or authority to bind the Company in any way, to pledge its credit or to render it liable for any purpose.

**3.4 MEMBER HAS NO EXCLUSIVE DUTY TO COMPANY.** The Member will not be required to manage the Company as its sole and exclusive function. The Member may have other business interests and may engage in other activities in addition to those relating to the Company. The Company will not have any right, by virtue of this Agreement, to share or participate in such other activities of the Member or to the income or proceeds derived therefrom.

**3.5 RECORDS.** At the expense of the Company, the Member will maintain the following records required to be maintained by Section 29-607 of the Act, or any successor provision thereto, at the Company's registered office:

(a) The full name and last known business or mailing address of the Member;

(b) A copy of the Articles of Organization of the Company and all amendments thereto, together with executed copies of any powers of attorney pursuant to which any amendment has been executed;

(c) Copies of the Company's currently effective written Operating Agreement and all amendments thereto, copies of any prior written Operating Agreement no longer in effect, and copies of any writings permitted or required with respect to the Member's obligation to contribute cash, property, or services;

(d) Copies of the Company's federal, state, and local income tax returns and reports, if any, for the three most recent years;

(e) Copies of financial statements of the Company, if any, for the three most recent years;

(f) Minutes of every annual, special, and court-ordered meeting, if any; and

(g) Any written consents obtained from the Member for actions taken by the Member without a meeting.

**3.6 TAX RETURNS AND ELECTIONS.** The Member will at the expense of the Company cause the preparation and timely filing of all federal, state and local tax returns required to be filed by the Company, if any. All elections permitted to be made by the Company under federal, state or local law will be made by the Member in its sole discretion.

**3.7 EXCULPATION OF MEMBER.** Any act or the failure to do any act by the Member, or any shareholder, director, officer or employee of the Member (collectively the "Indemnified Parties"), the effect of which results in loss or damage to the Company, will not give rise to any liability to the Member or the Indemnified Parties, if such act or failure to act is done in good faith to promote the best interest of the Company or is done pursuant to advice of independent legal counsel, accountants or other experts selected, engaged or retained by the Member with reasonable care. The preceding sentence will not relieve any person of liability for gross negligence, bad faith, dishonesty or misappropriation of Company assets.

**3.8 INDEMNIFICATION OF MEMBER; INSURANCE.** The Company will, solely from Company assets, indemnify and hold the Member and the Indemnified Parties harmless from and against any loss, cost, damage, liability, injury or expense (including but not limited to attorneys' fees and disbursements) suffered or sustained by the Member and the



Indemnified Parties by reason of any acts, omissions or alleged acts or omissions arising out of activities on behalf of the Company or in furtherance of the interests of the Company, including, but not limited to, any judgment, award, settlement, reasonable attorneys' fees and other costs and expenses incurred in connection with the defense of any actual or threatened action, proceeding or claim; provided that the acts or omissions or alleged acts or omissions upon which such actual or threatened action, proceeding or claim is based were not performed or omitted as a result of gross negligence, bad faith, dishonesty or misappropriation of Company assets. The Company will also have the power to purchase and maintain insurance on behalf of the Member and the Indemnified Parties against any liability asserted against the Member and the Indemnified Parties and incurred by the Member and the Indemnified Parties in any such capacity or arising out of their status as a Member or an Indemnified Party, whether or not the Company would have the power to indemnify the Member or the Indemnified Party against such liability under the provisions of this Section 3.8 or applicable law.

#### **ARTICLE 4**

##### **MEMBERS**

**4.1 LIMITATION OF LIABILITY.** The Member's liability for the debts and obligations of the Company will be limited as set forth in Section 29-651 of the Act, or any successor provision thereto, and other applicable law.

**4.2 MEETINGS OF THE MEMBER.** There will be no required annual meeting by the Member. However, special meetings by the Member, for any purpose or purposes, unless otherwise prescribed by statute, may be called by the Member.

**4.3 ACTION BY MEMBER WITHOUT A MEETING.** Action required or permitted to be taken at a meeting of the Member may be taken without a meeting if the action is evidenced by one or more written consents describing the action taken and signed by the Member.

#### **ARTICLE 5**

##### **DISTRIBUTIONS AND TAX CLASSIFICATION**

**5.1 DISTRIBUTIONS PRIOR TO LIQUIDATION.** Prior to the dissolution of the Company and the commencement of the liquidation of its assets and winding up of its affairs, the Member, promptly following the end of its fiscal year and at such other times as it may deem appropriate, will determine and distribute the Company's "net available cash flow" to the Member. For purposes of this Agreement, "net available cash flow" means the excess of gross cash receipts (exclusive of initial and additional capital contributions and, except to the extent the Member determines otherwise, proceeds received from any borrowings by the Company) over cash disbursements, without deduction for depreciation, cost recovery deductions and other non-cash charges, for (a) all operating costs, (b) all principal and interest payments on debts (including payments of Member loans), (c) all asset acquisition costs and

capital costs necessary for the maintenance, repair and improvement of the Company's assets, and (d) reasonable reserves, as determined by the Member.

**5.2 DISTRIBUTIONS IN LIQUIDATION.** Following the dissolution of the Company and the commencement of winding up and the liquidation of its assets, all distributions to the Member will be governed by Article 7.

**5.3 TAX CLASSIFICATION.** Solely for federal, state and local income tax purposes, as long as the Member is the sole member of the Company, the Member intends that the Company be treated either as a branch or division of the Member or disregarded. The Member will file all necessary or appropriate forms in accordance with such tax classification.

## **ARTICLE 6**

### **ADMISSIONS**

No person will be admitted as a member of the Company after the date of formation of the Company without the written consent or approval of the Member. Upon admission, the members will amend this Agreement to reflect the admission of the new member.

## **ARTICLE 7**

### **DISSOLUTION AND TERMINATION**

**7.1 DISSOLUTION.** The Company will dissolve upon the first to occur of any of the following events:

- (a) The written election of the Member any time; or
- (b) The entry of a decree of dissolution under Section 29-785 of the Act.

Unless otherwise required by the Act, the occurrence of an event of withdrawal (as defined in Section 29-733 of the Act) with respect to the Member will not cause a dissolution of the Company.

**7.2 NOTICE OF WINDING UP.** Promptly following the dissolution of the Company, the Member will cause a Notice of Winding Up to be filed with the Arizona Corporation Commission in accordance with the Act.

**7.3 LIQUIDATION, WINDING UP AND DISTRIBUTION OF ASSETS.** Following an event that causes a dissolution of the Company, the Member will proceed to liquidate the Company's assets and properties, discharge the Company's obligations, and wind up the Company's business and affairs as promptly as is consistent with obtaining the fair value of the Company's assets and properties. The proceeds of liquidation of the Company's assets, to the extent sufficient therefor, will be applied and distributed as follows:

(a) First, to the payment and discharge of all of the Company's debts and liabilities except those owing to the Member or to the establishment of any reasonable reserves for contingent or unliquidated debts and liabilities;

(b) Second, to the payment of any debts and liabilities owing to the Member; and

(c) Third, to the Member.

Notwithstanding anything in this Section 7.3 to the contrary, in lieu of liquidating all of the Company's assets and properties, the Member may make in-kind liquidating distributions of the Company's assets and properties in satisfaction of its liquidation priorities set forth in Sections 7.3(b) and 7.3(c).

**7.4 DEFICIT CAPITAL ACCOUNT.** Except as otherwise required by the Act, the Member will have no obligation to contribute or advance any funds or other property to the Company by reason of the fact that the Company's assets and properties are not sufficient to pay all of the Company's debts and obligations upon completion of winding up or at any other time.

**7.5 ARTICLES OF TERMINATION.** When all of the remaining property and assets have been applied and distributed in accordance with Section 7.3, the Member will cause Articles of Termination to be executed and filed with the Arizona Corporation Commission in accordance with the Act.

## **ARTICLE 8**

### **MISCELLANEOUS PROVISIONS**

**8.1 APPLICATION OF ARIZONA LAW.** This Agreement will be construed and enforced in accordance with the laws of the State of Arizona.

**8.2 AMENDMENTS.** This Agreement may not be amended except by written instrument executed by the Member.

**8.3 HEADINGS.** The headings in this Agreement are inserted for convenience only and are in no way intended to describe, interpret, define, or limit the scope, extent, or intent of this Agreement or any provision of this Agreement.

**8.4 SEVERABILITY.** If any provision of this Agreement or the application of any provision of this Agreement to any person or circumstance will be invalid, illegal, or unenforceable to any extent, the remainder of this Agreement and the application the remainder of this Agreement will not be affected and will be enforceable to the fullest extent permitted by law.

**8.5 SUCCESSORS AND ASSIGNS.** Each and all of the covenants, terms, provisions, and agreements herein contained will be binding upon and inure to the benefit of the Member and, to the extent permitted by this Agreement and by applicable law, its successors and assigns.

**8.6 CREDITORS AND OTHER THIRD PARTIES.** None of the provisions of this Agreement will be for the benefit of or enforceable by any creditor of the Member or the Company or by any other third party.

**8.7 ENTIRE AGREEMENT; SUPERSEDURE.** This Agreement constitutes the entire statement of the Member relating to the Company and supersedes all prior statements, contracts or agreements with respect to the subject matter of this Agreement, whether written or oral.

The undersigned has duly executed this Operating Agreement of Drake Switching Company, LLC as of the date first set forth above.

**MEMBER:**

SKANON INVESTMENTS, INC., an Arizona  
corporation



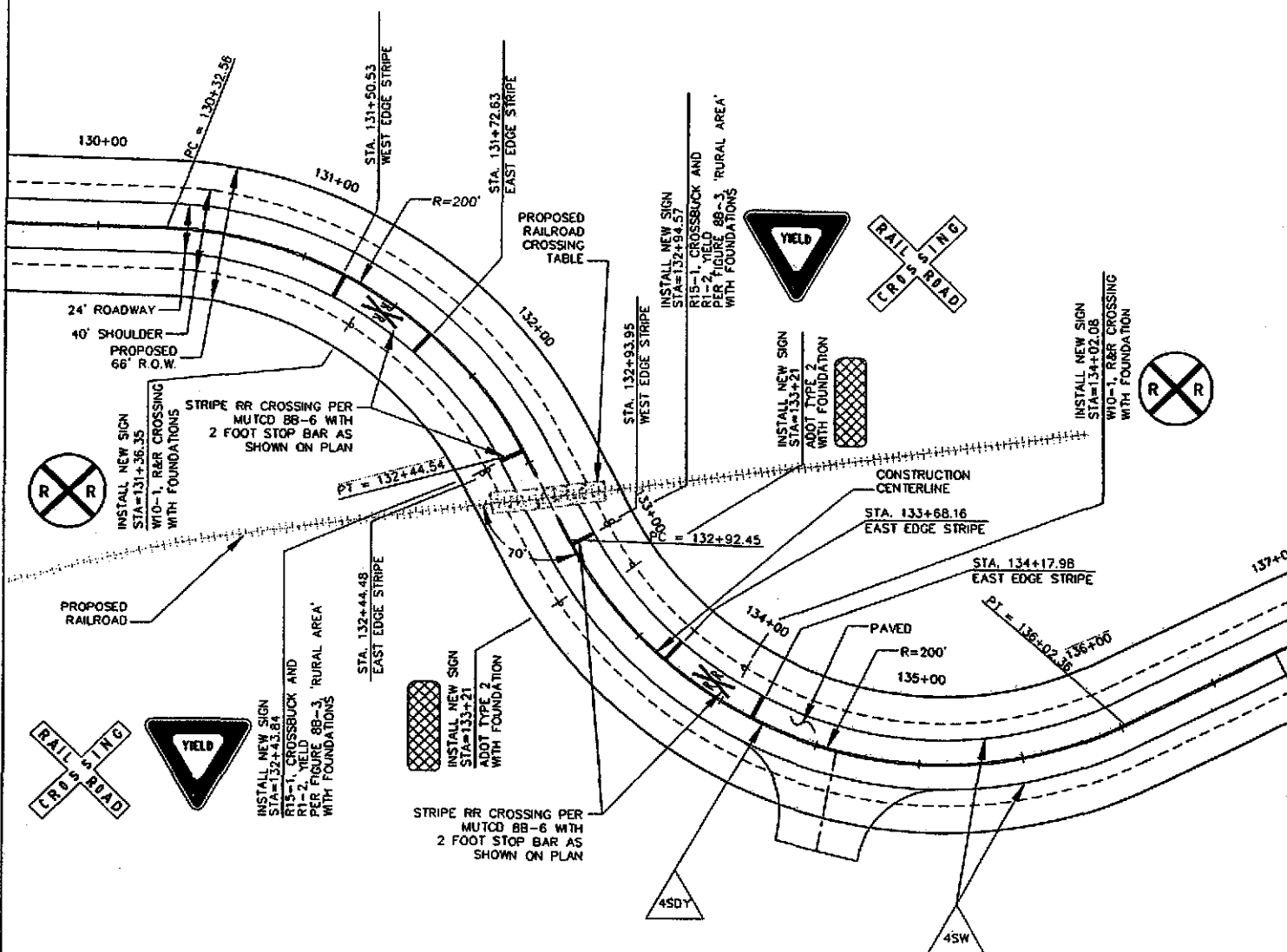
Sergio B. Muñoz, Authorized Officer

## **EXHIBIT 3**



## **EXHIBIT 4**

NTS



# SIGNAGE AND STRIPING CENTER RAILROAD CROSSING

MARCH 19, 2010

## STRIPING LEGEND:



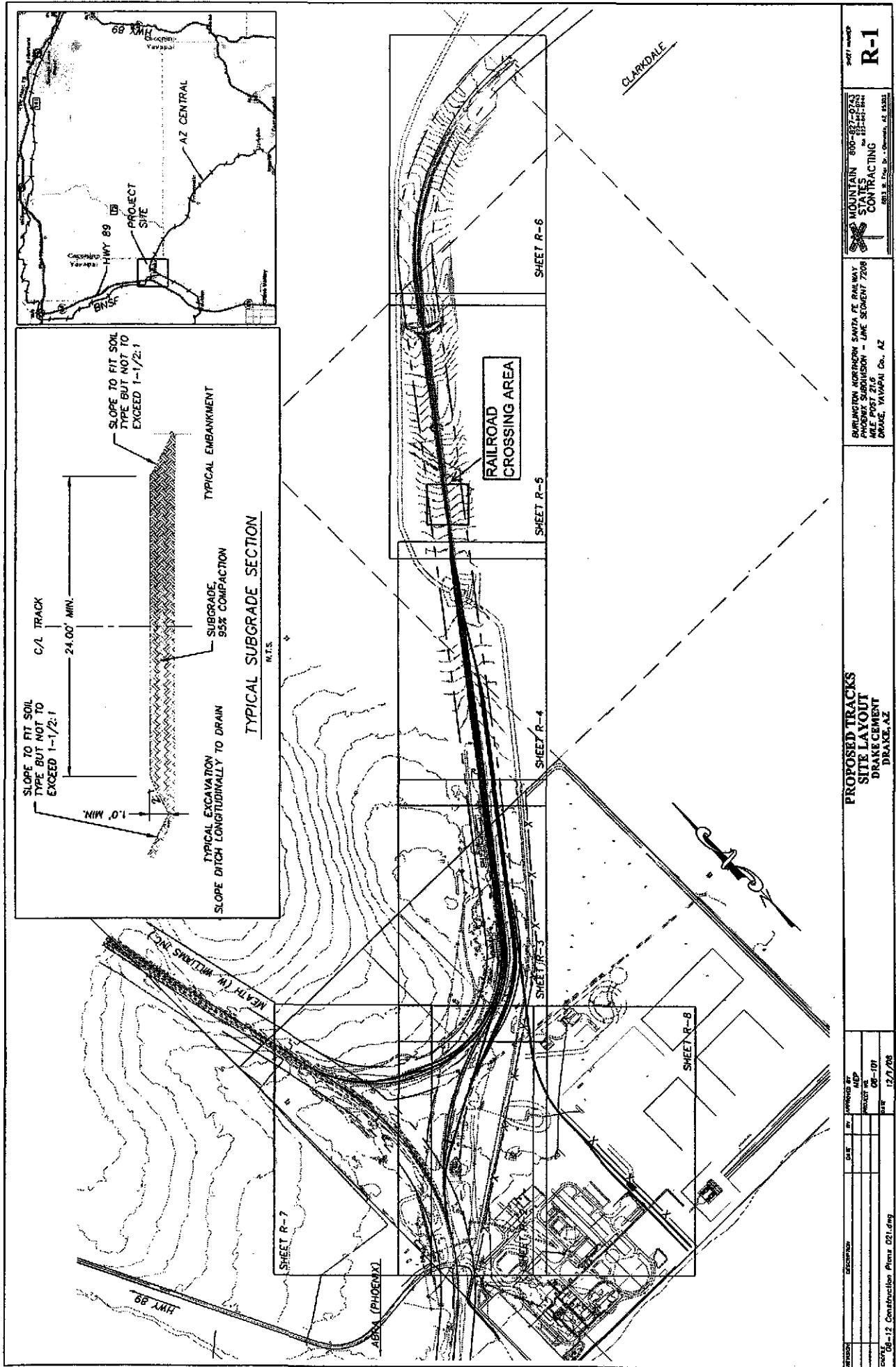
4" SOLID DOUBLE YELLOW



4" SOLID WHITE



## **EXHIBIT 5**



PROPOSED TRACKS  
SITE LAYOUT  
DRAKE CEMENT  
DRAKE, AZ

| REVISION | DESCRIPTION       | DATE     | BY | APPROVED BY |
|----------|-------------------|----------|----|-------------|
| 1        | ISSUED FOR PERMIT | 08-10-01 |    |             |
| 2        | FOR CONSTRUCTION  | 12/2/08  |    |             |

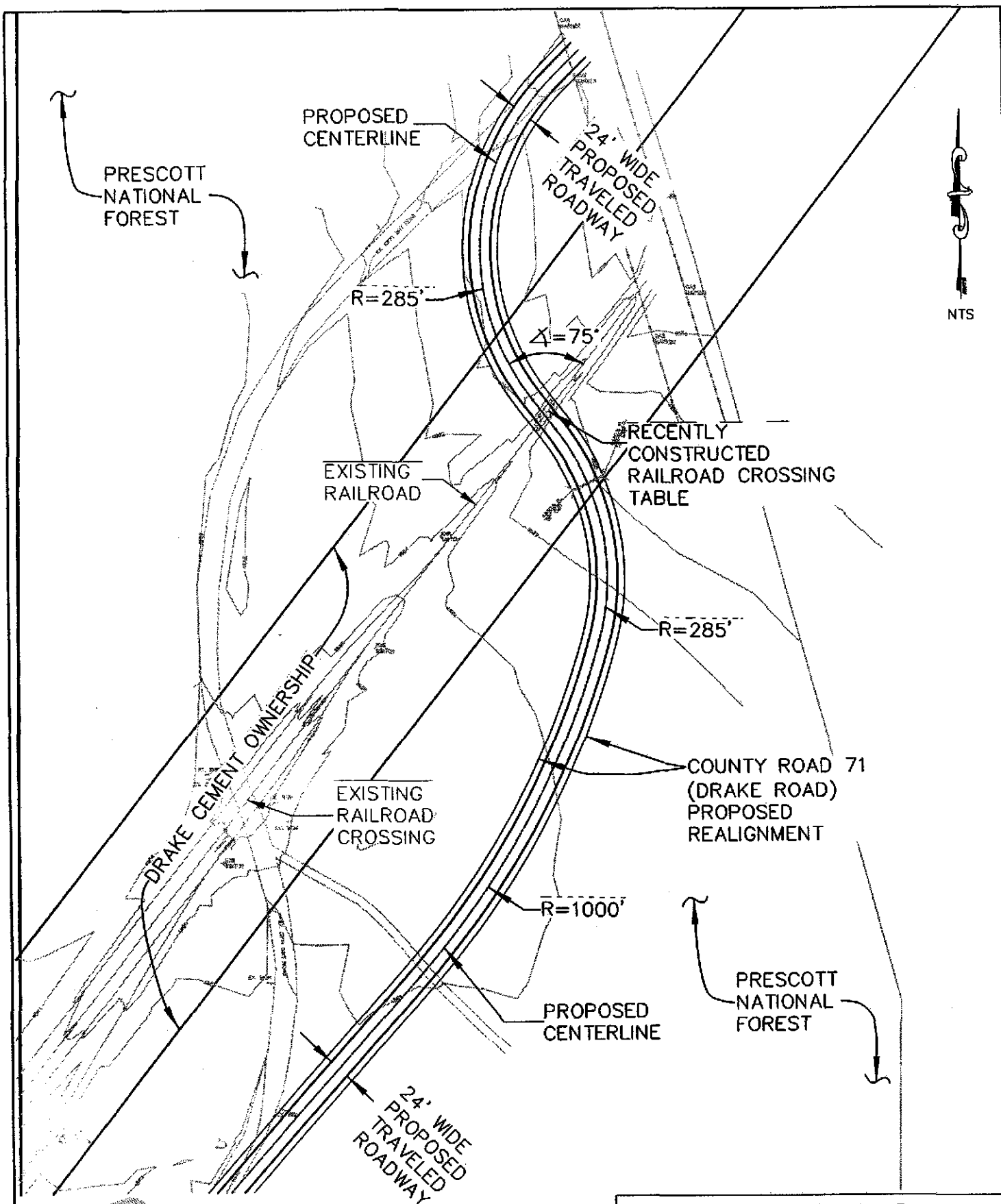
Drawn by: 08-12 Construction Plans 021.dwg

BIRMINGHAM, ALABAMA  
SANTA FE RAILWAY  
PHOENIX SUBDIVISION - LINE SEGMENT 7208  
MILE POST 27.6  
DRAKE, YAVAPAI CO., AZ

MOUNTAIN STATES CONTRACTING  
800-887-0743  
1111 W. Pinal Ave., Suite 100  
Phoenix, AZ 85015

SHEET NUMBER  
**R-1**

## **EXHIBIT 6**



NTS

**CIVILTEC**  
engineering inc.

2050 N. WILLOW CREEK RD.  
PRESCOTT, AZ 86301  
OFFICE: (928) 771-2376  
FAX: (928) 771-2377

DRAKE CEMENT PLANT  
YAVAPAI COUNTY, STATE OF ARIZONA

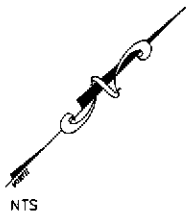
CONCEPTUAL  
EASTERLY RAILROAD  
CROSSING EXHIBIT

JANUARY 4, 2010

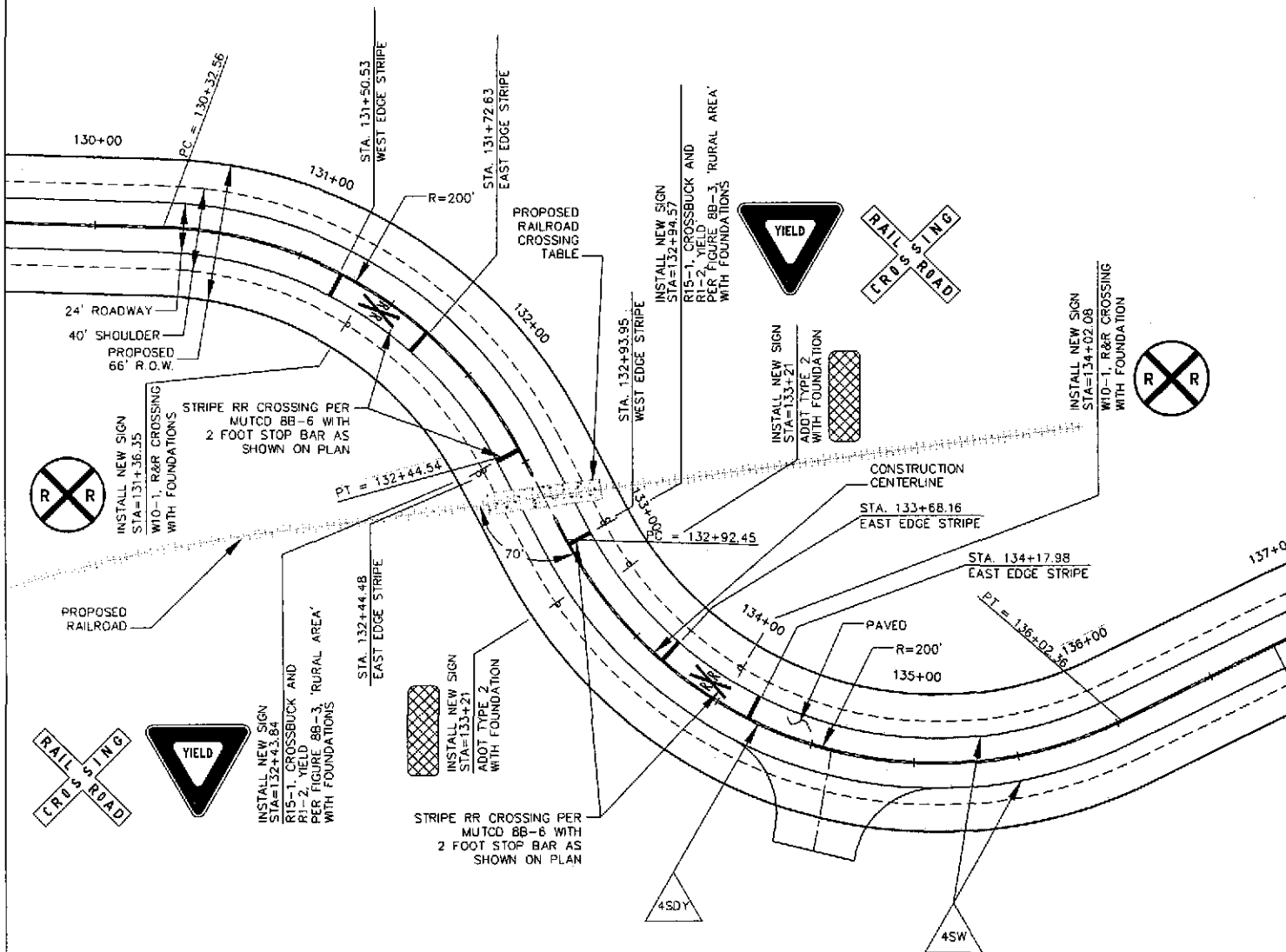
## **EXHIBIT 7**

**Application For Establishment  
Of New Public Highway-Rail Grade Crossing**

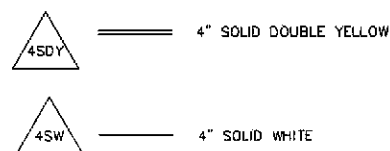
**EXHIBIT 2**



NTS



**STRIPING LEGEND:**



**SIGNAGE AND STRIPING  
CENTER RAILROAD CROSSING**

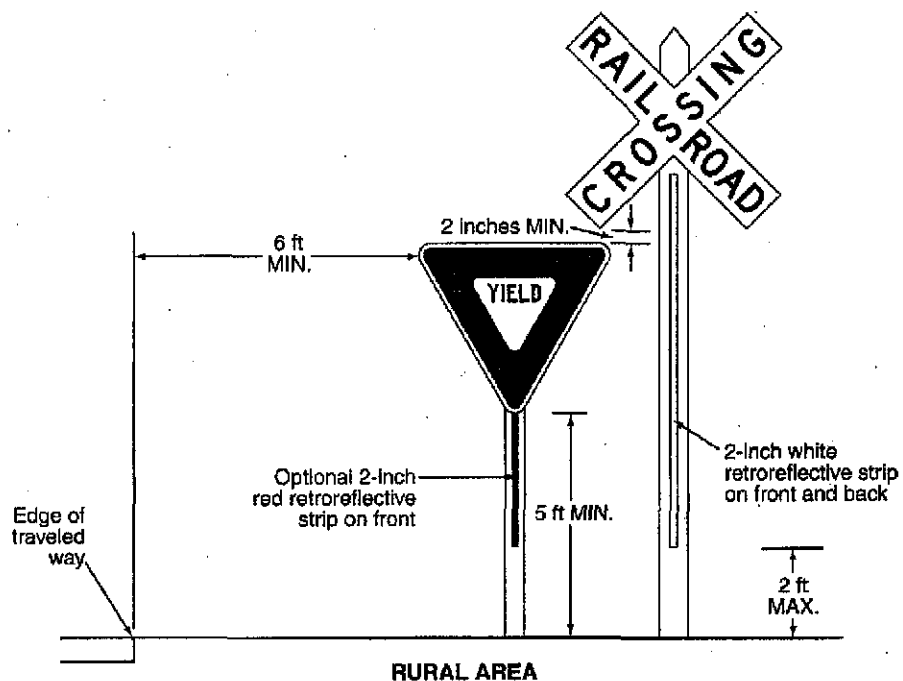
MARCH 19, 2010

**Application For Establishment  
Of New Public Highway-Rail Grade Crossing**

**EXHIBIT 3**



**Figure 8B-3. Crossbuck Assembly with a YIELD or STOP Sign  
on a Separate Sign Support (Sheet 1 of 2)**



**Application For Establishment  
Of New Public Highway-Rail Grade Crossing**

**EXHIBIT 4**

---

**From:** Tim Stotler [Tim.Stotler@co.yavapai.az.us]  
**Sent:** Tuesday, March 09, 2010 10:08 AM  
**To:** 'Andres Sotil'; 'Rick Shroads'  
**Cc:** 'Brian Lehman'; Phil Bourdon; Dale Andress  
**Subject:** Drake Road Traffic Counts

For your information and use:

Below is the tabulation of historic traffic count data on Drake Road sorted by date with the most recent counts at the top of the list. The locations located 1.170 and 1.214 miles from SR 89 are on the pavement between the cement plant and the highway. We did one count located just east of the third rail crossing on March 3<sup>rd</sup> at location labeled as 2.75 mi from S.R. 89 r/w.

Please let me know if there is anything else you need from the County at this time.

Tim Stotler, P.E.  
Yavapai County Assistant County Engineer

| Location                 | Date    | ADT  |
|--------------------------|---------|------|
| 1.214 from S.R. 89 r/w   | 3/3/10  | 1336 |
| 2.75 mi from S.R. 89 r/w | 3/3/10  | 221  |
| 1.170 from S.R. 89 r/w   | 6/16/08 | 996  |
| 1.170 from S.R. 89 r/w   | 4/23/08 | 1058 |
| 1.170 from S.R. 89 r/w   | 6/15/06 | 516  |
| 1.170 from S.R. 89 r/w   | 5/2/05  | 484  |
| 1.170 from S.R. 89 r/w   | 7/21/04 | 414  |
| 1.170 from S.R. 89 r/w   | 9/17/03 | 477  |
| 1.170 from S.R. 89 r/w   | 6/19/02 | 404  |
| 1.170 from S.R. 89 r/w   | 4/9/02  | 461  |
| 1.170 from S.R. 89 r/w   | 7/31/00 | 436  |
| 1.170 from S.R. 89 r/w   | 2/23/99 | 463  |
| 1.170 from S.R. 89 r/w   | 6/16/98 | 332  |
| 1.170 from S.R. 89 r/w   | 9/17/96 | 284  |
| 1.170 from S.R. 89 r/w   | 8/13/96 | 232  |
| 1.170 from S.R. 89 r/w   | 9/22/95 | 260  |
| 1.170 from S.R. 89 r/w   | 12/8/94 | 168  |
| 1.170 from S.R. 89 r/w   | 8/9/94  | 189  |
| 1.170 from S.R. 89 r/w   | 8/25/93 | 98   |
| 1.170 from S.R. 89 r/w   | 6/1/92  | 133  |
| 1.170 from S.R. 89 r/w   | 7/31/91 | 137  |
| 1.170 from S.R. 89 r/w   | 4/19/91 | 166  |
| 1.170 from S.R. 89 r/w   | 6/7/90  | 150  |
| 1.170 from S.R. 89 r/w   | 5/8/90  | 159  |
| 1.170 from S.R. 89 r/w   | 2/9/90  | 114  |
| 1.170 from S.R. 89 r/w   | 8/2/89  | 151  |
| 1.170 from S.R. 89 r/w   | 7/13/88 | 83   |

**Application For Establishment  
Of New Public Highway-Rail Grade Crossing**

**EXHIBIT 5**

|  |              |
|--|--------------|
| Construction of Concrete Pavement at RR Crossing | \$140,000.00 |
| Engineering Inspection                           | \$3,000.00   |
| Stake and Surveying                              | \$3,000.00   |
| Material Testing                                 | \$3,000.00   |
| Design of Railroad Crossing Center               | \$30,000.00  |
| Subgrade Materials for RR Crossings Construction | \$20,000.00  |
| <i>Subtotal</i>                                  | \$199,000.00 |
| Contingencies (15%)                              | \$29,850.00  |
| Total  | \$228,850.00 |